IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

R.S.A. No. 3125 of 1994

Date of decision: November 10, 2006

*Jai Singh and Ors.* .....*Appellants*

*Versus*

*Gurmej Singh* .....*Respondent*

CORAM: HON'BLE MRS. JUSTICE NIRMAL YADAV

Present: Mrs. Anju Arora, Advocate
for the appellants

Mr. P.K. Gupta, Advocate
for the respondent

NIRMAL YADAV, J

The basic question involves in the present appeal is whether sale of a specific portion of a land described by particular khasra numbers, by a co-owner out of the joint khewat, would be a sale of share out of the joint land, or whether appellants (vendees ) become the co-owners with the other co-sharers in the joint land, in the of their becoming co-owners, the sale is pre-emptible under Section 15 (1)(b) of Punjab Pre-emption Act, 1913 ( herein-after called as 'the Act').

Brief facts leading to the present controversy, are that vendor ( Bhartu ) sold the land measuring 20 kanals, being 400/3723 share out of the total land measuring 186 kanals 3 marlas vide registered sale deed dated 11.04.1990 to the appellant for a consideration of Rs.1,80,000/-. Gurmej Singh-respondent filed a suit for possession by way of pre-emption, wherein it was pleaded that that the vendor ( Bhartu) had sold the land measuring 20

kanals out the joint khewat. The plaintiff being the co-sharer has a right to pre-empt the sale under Section 15(1)(b) of the Act. The said suit was contested by the vendees stating that the pre-emptor had no superior right of pre-emption. *Firstly*, the khewat containing the suit land had been partitioned between various co-sharers much prior to the sale through an oral partition and; *secondly*, the sale was out the defined share of the vendor. On the basis of the pleadings of the parties, various issues were framed, but only two issues were contested before the trial Court, which are to the following effect:

1) *Whether plaintiff has superior right to pre-emptor the land in dispute being co-sharer? OPP*

2) *Whether plaintiff is estopped from filing present suit by his own act and conduct? OPD*

On both the issues, the trial Court returned its findings in favour of the pre-emptor holding that he had a superior right of pre-emption and, that he was not guilty of any such act, which could stop him for pre-empting the same.

Learned counsel for the appellants argued that from the sale deed, EX.P-4, it is evident that specific khasra numbers had been sold by the vendor. It is further pointed out that the defined portion of the joint land has been sold and the appellants (vendees) have been put into possession of the specific khasra numbers. It is argued that where a co-sharer sells his share as a specified part of joint land, the vendees do not become co-sharers, the sale being not a share out of the joint land. Therefore, the plaintiff-respondent does not become co-sharer in the property in dispute and, as such, has no preferential right of pre-emption with regard to sale of specific

part of vendor's share. In support of his contention, the learned counsel for the appellants has referred to a Full Bench Judgment of this Court *Lachhman Singh Versus Pritam Chand* – ***AIR 1970 P&H) 304 .***

On the other hand, learned counsel for the respondent submitted that later on the Full Bench of this Court in *Bhartu Vs. Ram Sarup* – ***1981 P.L.J. 204***, has taken into consideration *Lachhman Singh's* case (supra) and observed that the question involved in *Lachhman Singh's* case was as to whether the purchaser of a specific portion of some killa numbers in two rectangles would become a co-sharer in the khewat consisting of several other rectangles and would be entitled to pre-empt the sale of land out of the rectangles other than in which he became owner by the said purchase and on these facts, it was held that such a purchaser does not become a co-sharer in the khewat and, therefore, has no right to pre-empt the sale.

The proposition laid down by the Full Bench in *Lachhman Singh's* case (supra) has no direct bearing on the question whether the sale of a specific khasra numbers out of a khewat would be a sale of a share out of the joint land or not. The answer to the above query depends on the inter-se rights of the co-sharers in the joint khewat and the nature of the sale of a specified portion of the joint holding. The inter-se rights and liabilities of the co-sharers, have been discussed in detail by a Division Bench of this Court in *Sant Ram Nagina Ram Vs. Daya Ram Nagina Ram* - ***AIR 1961 (Pb.) 528*****,** wherein, following propositions were settled:-

(1) *A co-owner has an interest in the whole property and also in every parcel of it.*

(2) *Possession of joint property by one co-owner, is in the eye*

*of law, possession of all even if all but one are actually out of possession.*

*(3) A mere occupation of a larger portion or even of an entire joint property does not necessarily amount to ouster as the possession of one is deemed to be on behalf of all.*

*(4) The above rule admits of an exception when there is ouster of a co-owner by another. But in order to negative the presumption of joint possession on behalf of all, on the ground of ouster, the possession of a co-owner must not only be exclusive but also hostile to the knowledge of the other as, when a co-owner openly asserts his own title and denies that of the other.*

*(5) Passage of time does not extinguish the right of the co owner who has been out of possessions of the joint property except in the event of ouster or abandonment.*

*(6) Every co-owner has a right to use the joint property in a husband like manner not inconsistent with similar rights of other co-owners.*

*(7) Where a co-owner is in possession of separate parcels under an arrangement consented by the other co-owners, it is not open to any body to disturb the arrangement without the consent of others except by filing a suit for partition.*

From the above propositions, it is evident that when a co-sharer sells his share in the joint holding or any part thereof and puts the vendees into possession of the land in his possession, what he transfers is his right as co-sharer in the said land and the right to remain in its exclusive possession till the joint holding is partitioned amongst all the co-sharers. The transferee gets the same right as that of transferor to joint possession and has further right to enforce a partition of the same irrespective of the fact, whether the property sold is fractional share or specified portion, exclusively in

possession of the transferor. He can be exclusive owner of the property of the joint holdings as a co-sharer and all the other co-sharers can also continue to be in its constructive possession. By transfer of a land by one co-owner, the other co-sharers do not cease to be co-sharers in that land or to be in their constructive possession. In *Bhartu's* case (supra), after considering the entire propositions in details, it was held that *sale of a specified portion of land out of the joint holding by one of the co-owners, is nothing but a sale of share out of the joint holding and is pre-emptible under Section 15 (1) (b) of the Act.* The ratio of *Bhartu's case* (supra) is fully applicable to the fact of the present case.

A perusal of the sale deed, EX P-4, clearly shows that Bhartu (vendor) had sold land his share of 400/3723$^{th}$, measuring 20 kanals out of the total land. It is, however, mentioned in the sale deed that the possession of the land comprised in khasra numbers 15/24(8-0), 25(8-0), 18/4/1 (4-0), was delivered to the vendees. However, it is nowhere mentioned in the sale deed that the land was ever partitioned and was out of the defined part of the land, rather it is clearly mentioned that vendor was selling his 400/3723$^{th}$ share out of the total holding. Except the oral testimony of DW-1-Jai Singh, there is no evidence on record that the land was ever partitioned. According to the appellants, there was an oral partition, but neither specific date or time has been given of the alleged partition having effected nor such partition had ever been affirmed by an order of the revenue officer nor any entry was reflected in revenue record in this respect. Accordingly, the severance status of the vendor's land is not proved by the appellants. Even from the jamabandi for the year 1984-85, Ex.P-1, it is clear that Bhartu (vendor) and

Gurmej Singh (pre-emptor) have been shown to be the joint owners of the property along with other co-sharers. The appellants have not produce any evidence with regard to their contention that an oral partition between the parties took place.

With regard to repeal of the right of a co-sharer by the Amending Act of 1995, the right of co-sharers has been held to be prospective in operation and it does not affect the right of the parties to the litigation on the date of the adjudication of the pre-emption suit and the appellate Court is not required to take into account or give effect to the substituted Section 15, introduced by the Amending Act. Hon'ble the Supreme Court in *Shyam Sunder and another Versus Ram Kumar and another* **2001 (3) R.C.R. (Civil) 754,** approved the view taken in *Didar Singh etc. Versus Ishar Singh( dead) by Lrs. Etc.* **1995 (1) Scale 1** , wherein it was held that in a suit for pre-emption, the pre-emptor must prove his right to pre-empt upto the date of decree of the first Court and any loss of right or subsequent change in law after the date of adjudication of the suit and during pendency of appeal would not affect the decree of the first Court. It was further held that the Amending Act being prospective in operation, does not affect the rights of the parties to the litigation on the date of adjudication of the pre-emption suit.

In view of the above discussion, the appeal is dismissed having no merit.

( NIRMAL YADAV)
JUDGE

November 10, 2006
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